LOUIS JAMES CARTER

v.

THE MANAGING PARTNER, NORTHMORE HALE DAVY & LEAKE & ORS.

HIGH COURT, AUSTRALIA
BRENNAN, DEANE, TOOHEY, GAUDRON & MCHUGH JJ
[F.C. 95/020]
14 JUNE 1995

***EVIDENCE**: Legal professional privilege - No waiver by person entitled to privilege - Whether accused person in criminal case can compel the production of documents subject to privilege if it assists his defence or establishes his innocence.*

***EVIDENCE**: Legal professional privilege - Whether rule of substantive law or rule of evidence.*

The appellant was the leader of a team of accountants who audited Rothwells Ltd., a merchant bank which went into liquidation. He was charged for conspiracy to defraud the public with 2 directors of Rothwells and for concurring with publishing of false financial reports with intent to deceive members or creditors of Rothwells, being an auditor of Rothwells.

For his defence, he caused to be issued five subpoenas seeking documents and other records relating to the rescue and financial accommodation to Rothwells, from the managing partner of a firm of solicitors acting for Wardley Australia Ltd. and Wardley Australia Security Ltd. The Wardley Companies were being sued by the State of Western Australia for damages.

In pretrial proceedings, Seaman J upheld the objection that the documents were covered by legal professional privilege as they were all brought into existence solely for the purpose of giving of confidential legal advice by a qualified legal practitioner acting in his professional capacity, and as such were protected from production and inspection.

An appeal against the decision of Seaman J to the full Court of the Supreme Court of Western Australia was dismissed by that Court. The issue for determination was whether persons having in their possession or power documents which are subject to legal professional privilege can be compelled to produce those documents on subpoena issued on behalf of an accused person in criminal proceedings when those document may establish the innocence of the accused or may materially assist his defence but the person entitled to the privilege does not waive it. The appellant conceded that no decision of the High Court of Australia establishes such a proposition. Relying on decision in other countries, the appellant contended that the Court should declare a new exception to the doctrine of legal professional privilege that would enable the accused to obtain documents not otherwise to be disclosed.

Held:

Per Brennan, Deane and McHugh JJ:

[1] Legal professional privilege promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisors, the law being a complex and complicated discipline. It keeps secret their communication, thereby inducing the client to retain the solicitor and seek his advice and encourages the client to make a full and frank disclosure of the relevant circumstances to the solicitor.

[2] The public interest in legal professional privilege is paramount to the more general public interest that all relevant documentary evidence is available in the interests of a fair trial. Any inroads into the privilege in individual cases would make its application uncertain and the policy behind it would be effectively undermined.

[3] Since the purpose of the privilege is to facilitate the application of the rule of law in the public interest, it is not possible to allow the interest of an individual accused in securing full disclosure to destroy the privilege which is conferred to advance that public interest.

[4] The "exceptions" to the doctrine of legal professional privilege are actually exclusions from the reach of the doctrine rather than exceptions to the scope of the protection which it affords. They are directed to circumstances in which the privilege does not attach with the result that the particular communication or document is not protected by the privilege at all. They are not directed to circumstances in which notwithstanding that legal professional privilege does attach, the Courts will override the privilege and order production or disclosure. The Courts need not embark on a balancing process to determine whether the consideration favouring disclosure outweighs the consideration favouring confidentiality.

[5] The *dicta* in *Reg v. Barton* that no privilege attaches to further help the defence of an accused man is unsupported by authority in Australia and England.

[6] Legal professional privilege is a substantive rule of law and not a mere rule of evidence. It is available as an answer to production of documents even in criminal proceeding. It also protects communication that seek or give legal advice in cases where no litigation is pending or contemplated. The doctrine is a practical guarantee of fundamental, constitutional or human rights and is a natural corollary of the rule of law and ensures equal protection of the law.

[7] To uphold the appellant's argument would be inconsistent with the rationale of the doctrine of legal professional privilege and as such, any exception to the doctrine should be done by the legislature and not the judiciary.

Per Toohey and Gaudron JJ (dissenting):

[1] Legal professional privilege exists to serve a purpose i.e. to promote the public interest by assisting and enhancing the administration of justice and is not an end in itself.

[2] The proper interests of an accused person in the adversarial system of justice does stand in a special position.

[3] Where an accused facing trial satisfies the Court that the production of documents subpoenaed by the accused is necessary for the proper conduct of his defence, then, subject to any proper objection that may be taken, other than on the ground of legal professional privilege, the Court may order production of those documents. The onus is on the accused to satisfy the Court that the documents are necessary for the proper conduct of the defence.

[4] The effect on the openness of discussions between lawyer and client on general terms can hardly stand as a reason in itself for refusing access to material which may be crucial to an accused's defence.

[Appeal dismissed]

Cases referred to:

Grant v. Downs [1976] 135 CLR 674 ***(foll)***
Baker v. Campbell [1983] 153 CLR 52 ***(foll)***
Attorney-General (NT) v. Maurice [1986] 161 CLR 475 ***(refd)***
Waterford v. The Commonwealth [1987] 163 CLR 54 ***(foll)***

Sankey v. Whitlam [1978] 142 CLR 1 ***(refd)***
Alister v. The Queen [1984] 154 CLR 404 ***(refd)***
Dietrich v. The Queen [1992] 177 CLR 292 ***(refd)***
Marks v. Beyfus [1980] 25 QBD 494 ***(refd)***
D. v. National Society for the Prevention of Cruelty to Children [1978] AC 171 ***(refd)***
Cain v. Glass (No. 2) [1985] 3 NSWLR 230 ***(refd)***
Roviaro v. U.S. [1957] 353 US 53 ***(refd)***
Bullivant v. Attorney-General for Victoria [1901] AC 196 ***(refd)***
AM & S Europe Ltd. v. Commission of the European Communities [1983] QB 878 ***(refd)***
Attorney-General (NT) v. Kearney [1985] 158 CLR 500, 532 ***(foll)***
Reg. v. Craig [1975] 1 NZLR 597 ***(refd)***
Reg. v. Ataou [1988] QB 798 ***(refd)***
Reg. v. Cox and Railton [1884] 14 QBD 153 ***(refd)***
Reg. v. Bell; Ex parte Lees [1980] 146 CLR 146 ***(refd)***
Reg. v. Barton [1973] 1 WLR 115 [1972] 2 ALL ER 11192 ***(not foll)***
D. v. National Society for the Prevention of Cruelty to Children [1978] AC 171 ***(cit)***
*Reg. v. Dunbar and Logan [1982] 138 DLR (3d) 221****(refd)***
Pearse v. Pearse [1846] 1 DEG & SM 12 ***(refd)***
Minet v. Morgan [1873] 8 Ch App 361 ***(refd)***
Rakusen v. Kllis, Munday & Clarke [1912] 1 Ch 831, 840 ***(foll)***
O'Reilly v. State Bank of Victoria Commissioners [1983] 153 CLR 1 ***(foll)***
Controlled Consultants Pty. Ltd. v. Commissioner for Corporate Affairs [1985] 156 CLR 385 ***(refd)***
Rochfort v. Trade Practices Commission [1982] 153 CLR 134 ***(refd)***
Environment Protection Authority v. Caltex Refining Co. Pty. Ltd. [1993] 178 CLR 477 ***(refd)***
Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation [1978] AC 547 ***(refd)***
Reg. v. Derby Magistrates Court; Ex parte B [1994] TLR 538 ***(refd)***
Reg. v. Connell (No. 2) [1992] 8 WAR 148 ***(refd)***
Reg.v. Uljee [1982] 1 NZLR 561 ***(refd)***
Solosky v. The Queen [1979] 105 DLR (3d) 745 ***(refd)***
Reg. v. Littlechild [1979] 108 DLR (3d) 340 ***(refd)***
Descoteaux v. Mierzwinski [1982] 141 DLR (3d) 590, [1982] 1 SCR 860 ***(refd)***
Geffen v. Goodman Estate [1991] 81 DLR (4th) 211 ***(refd)***
Varawa v. Howard Smith & Co. Ltd. [1910] 10 CLR 382 ***(refd)***
Greenough v. Gaskill [1833] 1 My & K 98 [39 ER 618] ***(refd)***
Russell v. Jackson [1851] 9 Hare 387 [68 ER 558] ***(refd)***
Re Kearney [1984] 55 ALR 545 ***(cit)***
Grofam Pty. Ltd. v. Australia and New Zealand Banking Group Ltd. [1993] 117 ALR 669 ***(cit)***
Reg. v. Barton [1973] 1 WLR 115 ***(cit)***
Adams v. Anthony Bryant & Co. Pty. Ltd. [1986] 67 ALR 616 ***(refd)***
Oxfordshire County Council v. M [1994] 2 All ER 269 ***(refd)***
Waugh v. British Railways Board [1980] AC 521 ***(refd)***
D v. NSPCC [1978] AC 171 ***(refd)***
Jago v. District Court (NSW) [1989] 168 CLR 23 ***(refd)***
Trade Practices Commission v. Abbco Ice Words Pty. Ltd. [1994] 123 ALR 503 ***(refd)***
Registrar v. Craven [1994] 126 ALR 668 ***(refd)***
Barton v. The Queen [1980] 147 CLR 75 ***(refd)***
James Clark [1930] 22 Cr App R 58 ***(refd)***
Mahadeo v. The King [1936] 2 All ER 813 ***(refd)***
Reg. v. Hall [1958] 43 Cr App R 29 ***(refd)***
Reg. v. Xinaris [1955] 43 Cr App R 30 ***(refd)***
Reg. v. Charlton [1972] VR 758 ***(refd)***
Maddison v. Goldrick [1976] 1 NSWLR 651 ***(refd)***

Berry v. The Queen [1992] 2 AC 364 ***(refd)***
British Coal Corporation v. Dennis Rye Ltd. [1988] 1 WLR 1113 ***(refd)***
The Commonwealth v. Northern Land Council [1993] 176 CLR 604 ***(refd)***
Carey v. Ontario [1986] 2 SCR 637; [1986] 35 DLR (4th) 161 ***(refd)***
Berd v. Lovelace [1577] Cary 62 (21 ER 33) ***(foll)***

Legislation referred to:
Crimes Act 1914 (Cth), s. 10
Criminal Code (WA), s. 611A
Freedom of Information Act 1982 (Cth)

Other sources referred to:
Wigmore on Evidence, McNaughton rev. (1961), Vol. 8, §2290 at 542
A History of English Law, Holdsworth, 3rd Edn. (1944) Vol. 9, at 201-202
Halsbury's Laws of England, 4th Edn. Vol. 17 para. 252, n. 3
Cross on Evidence, 6th Edn. (1985), p. 394-400
Cross on Evidence, Aust. Edn. (1991), Vol. 1, para. 25300
Criminal Pleading, Evidence & Practice, Archbold, (1993), Vol. 1, para. 12-12, p. 1573
Evidence, Australian Law Reform Commission, Report No. 38, (1987) para. 195, p. 113
Wigmore on Evidence, McNaughton rev. (1961), Vol. 8 para. 2,290
Cross on Evidence 5th Edn. (1979) p. 286
Halsbury's Laws of England, 4th Edn., reissue, Vol. 11(2) para. 1,163
Cross on Evidence Aust. Edn. (1991), Vol. 1, para. 25,300
A History of English Law, Holdsworth, 3rd Edn., (1944), Vol. 9 p. 202
Halsbury's Laws of England, 4th Edn., Vol. 11(2) para. 1163
Cross on Evidence, 4th Aust. Edn., (1991), Vol. 1 para. 25,300
Criminal Pleading Evidence & Practice, Archbold, (1993), Vol. 1 p. 1573
Law of Privilege, McNicol, (1992) p. 101-104

For the appellant - M/s. Freehill Hollingdale & Page
For the first, second and third respondents - M/s. Minter Ellison Morris Fletcher
For the fourth and fifth respondents - M/s. Blake Dawson Waldron

JUDGMENT

Brennan J:

Louis James Carter was the leader of a team of accountants who conducted the audit of Rothwells Limited, a merchant bank which, after an attempted rescue from financial failure in October 1987, went into liquidation. Carter now stands charged on indictment before the Supreme Court of Western Australia on five counts: on one count that he conspired with two directors of Rothwells to defraud the public and on four counts that, being an auditor of Rothwells Limited, he concurred in the publishing of false financial reports with intent to deceive members or creditors of Rothwells Limited. For the purposes of his defence, he caused to be issued five *subpoenas duces tecum* seeking documents and other records relating to the rescue and the provision of financial accommodation to Rothwells Limited or relating to three actions pending in the Federal Court of Australia. In those actions the State of Western Australia is seeking damages against Wardley Australia Limited and Wardley Australia Securities Limited (the Wardley companies). The first respondent in this appeal is the managing partner of a firm of solicitors acting for the Wardley companies in that litigation. The subpoenas are directed, *inter alia*, to the managing partner of that firm and to the proper officers of the Wardley companies. The documents sought by the subpoenas include documents which are the subject of legal professional privilege including proofs of evidence prepared for the purpose of legal advice in relation to the pending actions.

Objection was taken on affidavit to the production of documents which are the subject of legal professional privilege. Seaman J upheld the objection on that ground and an appeal against his decision was dismissed by the Full Court of the Supreme Court of Western Australia. The question for determination on this appeal is whether persons having in their possession or power documents which are subject to legal professional privilege can be compelled to produce those documents on subpoena issued on behalf of an accused person in criminal proceedings when those documents may establish the innocence of the accused or may materially assist his defence but the person entitled to the privilege does not waive it.

Counsel for the appellant accepts the general rule (laid down by this Court in *Grant v. Downs* [1976] 135 CLR 674; *Baker v. Campbell* [1983] 153 CLR 52; *Attorney-General (NT) v. Maurice* [1986] 161 CLR 475 and *Waterford v. The Commonwealth* [1987] 163 CLR 54 that, subject to particular exceptions, legal professional privilege prevails over an obligation to produce documents on subpoena unless the privilege is excluded or cut down by a clear statutory provision (See *Baker v. Campbell* [1983] 153 CLR at 79, 90, 96-97, 104-105, 116-117, 122, 123; *Attorney-General (NT) v. Maurice* [1986] 161 CLR at 491). However, it is submitted that the position of an accused in a criminal trial is especially protected by the law (*Sankey v. Whitlam* [1978] 142 CLR 1 at 42; *Alister v. The Queen* [1984] 154 CLR 404 at 414, 456; *Dietrich v. The Queen* [1992] 177 CLR 292 at 298. And see *Marks v. Beyfus* [1980] 25 QBD 494 at 498; *D. v. National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 232-233; *Cain v. Glass* (No. 2) [1985] 3 NSWLR 230 at 246-251; *Roviaro v. U.S.* [1957] 353 US 53) and that the immunity from production which is generally conferred by legal professional privilege is subject to an exception in favour of protecting the liberty of subject. In support of this submission, Counsel draws upon the approach taken by some Courts in other common law countries and he points to other exceptions by which the general immunity conferred by legal professional privilege is qualified.

The arguments advanced in support of the submission should be considered in the light of the rationale of the privilege and its scope. In *Grant v. Downs* [1976] 135 CLR at 685 Stephen, Mason and Murphy JJ stated the rationale thus:

> The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision.

In *Attorney-General (NT) v. Maurice* [1986] 161 CLR 487, Mason and Brennan JJ stated the *raison d'etre* of the privilege to be:

> the furtherance of the administration of justice through the fostering of trust and candour in the relationship between lawyer and client. The privilege is based on:
>
> > ... the need of laymen for professional assistance in the protection, enforcement or creation of their legal rights. They should have the benefit of that assistance, free of any restraint which fear of the disclosure of their communications with those advisers would impose. (*Reg v. Bell* [1980] 146 CLR 141 at 152, per Stephen J)

> When the privilege applies, it enables the client to keep the communication from disclosure and interferes with the public's 'right to every man's evidence': *Cobbett's Parliamentary History* [1812], vol. 12 at 675. Because of this conflict between the public interest in ensuring the availability of all relevant evidence in a particular case and the public interest in the administration of justice through effective legal representation, the privilege is confined within strict limits: *Grant v. Downs* [1976] 135 CLR at 685, per Stephen, Mason and Murphy JJ.

The justification for the privilege is satisfaction of a public interest rather than enforcement of a private right, though there is no dichotomy between the two. As the Earl of Halsbury LC said in *Bullivant v. Attorney-General for Victoria* [1901] AC 196 at 200-201; (see also per Lord Lindley at 206; *Waterford v. The Commonwealth* [1987] 163 CLR at 62, 64):

> for the perfect administration of justice, and for the protection of the confidence which exists between a solicitor and his client, it has been established as a principle of public policy that those confidential communications shall not be subject to production.

In my opinion, the basic justification for allowing the privilege is the public interest in facilitating the application of the rule of law.

Administration of the law is not the function of the Courts alone. The law is administered more frequently and more directly by legal advisers than it is by Judges. Legal professional privilege ensures that the law's writ can run effectively whenever a legal problem arises or a person seeks to chart a course of conduct in conformity with the law. The point was made by Advocate General Warner in *AM & S Europe Ltd. v. Commission of the European Communities* [1983] QB 878 at 913:

> Whether it is described as the right of the client or the duty of the lawyer, this principle has nothing to do with the protection or privilege of the lawyer. It springs essentially from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation; it springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks.

In *Waterford v. The Commonwealth* [1987] 163 CLR at 74, I said:

> the public interest served by legal professional privilege lies in its tendency to broaden the operation of the rule of law as well as to enhance the individual's capacity to secure its protection.

There is, of course, a public interest in having available all evidence relevant to the issues in litigation. And that public interest encompasses the public interest in achieving fairness in the trial of a person charged with a criminal offence. Although the public interest in having all relevant evidence available is, to an extent, defeated by the privilege, there is no occasion for the Courts to undertake a balancing of public interests: the balance is already struck by the allowing of the privilege. As Mason and Wilson JJ said in *Waterford* (*ibid*. at 64-65):

> Legal professional privilege is itself the product of a balancing exercise between competing public interests whereby, subject to the well-recognized crime or fraud exception (cf. *Reg. v. Bell; Ex parte Lees* [1980] 146 CLR 141), the public interest in 'the perfect administration of justice' (per Earl of Halsbury LC in *Bullivant v. Attorney-General* (Vict.) [1901] AC at 200) is accorded paramountcy over the public interest that requires, in the interests of a fair trial, the admission in evidence of all relevant documentary evidence. Given its application, no further balancing exercise is required.

I respectfully agree with an observation by Dawson J in *Attorney-General (NT) v. Kearney* [1985] 158 CLR 500 at 532; (see also per Deane J in *Attorney-General (NT) v. Maurice* [1986] 161 CLR at 490):

> The policy which lies behind the doctrine views unrestricted communication between lawyer and client upon professional matters as being necessary for the proper functioning of our legal system. If inroads could be made upon the privilege in individual cases by involving a 'higher public interest', its application would become uncertain and the policy behind it would be effectively undermined.

Of course, an individual charged with a criminal offence has his own interest in securing evidence that may tend to assist in his defence. But if there be no public interest which defeats the privilege, there can be no individual interest which does so. I do not subscribe to the view that legal professional privilege is a fundamental human right which sterilizes the operation of any law which infringes it. The privilege facilitates the giving of legal advice on any subject and consultations on legal problems of all kinds. An exception created in order to serve the interests of a person charged with a criminal offence would create, at least potentially, a right in such a person to destroy any privileged communication between legal adviser and client and perhaps to publish the contents of the privileged communication to the public generally by disclosing the communication in Court. No *a priori* assurance of confidentiality could be given to a client consulting a legal adviser, since confidentiality of such consultations would be contingent on the absence of an accused person's subpoena seeking production or evidence of the communication. The contingency would have a chilling effect on the seeking of advice as to the law governing proposed conduct or relating to an event or transaction.

The appellant sought to deny the blanket protection of the privilege, however, pointing to the exceptions to the scope of the privilege which have been recognized. Our attention was drawn to the opinion of Cooke J in *Reg. v. Craig* [1975] 1 NZLR 597 at 599 where his Honour thought that it might be possible for the prosecution in criminal proceedings to show that a claim of privilege could not be sustained by demonstrating, *inter alia*:

> that there is no ground on which the client could any longer be reasonably regarded as having a recognisable interest in asserting the privilege.

In England, the Court of Appeal, basing themselves on the observations of Cooke J in *Craig*, said in *Reg. v. Ataou* [1988] QB 798 at 807:

> When a communication was originally privileged and in criminal proceedings privilege is claimed against the defendant by the client concerned or his solicitor, it should be for the defendant to show on the balance of probabilities that the claim cannot be sustained. That might be done by demonstrating that there is no ground on which the client could any longer reasonably be regarded as having a recognisable interest in asserting the privilege. The Judge must then balance whether the legitimate interest of the defendant in seeking to breach the privilege outweighs that of the client in seeking to maintain it.

This passage is not without its difficulties. If the client otherwise entitled to the privilege has no "recognisable interest" in asserting the privilege, what is the client's interest "in seeking to maintain" the privilege which has to be weighed against the interest of the defendant in the criminal trial? Counsel for the appellant was not concerned to argue for this limitation on the scope of the privilege, and the correctness of this view is not material to the present case. The exception for which Counsel contended in favour of a person charged with a criminal offence was suggested to be merely an addition to the recognized categories

of exceptions. Those exceptions - communications in furtherance of crime, fraud *Reg. v. Cox and Railton* [1884] 14 QBD 153 at 165 or abuse of power *Attorney-General (NT) v. Kearney* [1985] 158 CLR 500, to conceal the whereabouts of a ward of Court *Reg. v. Bell; Ex parte Lees* [1980] 146 CLR at 146 or to frustrate the execution of a Court order *ibid*, at 151, 162 - show that the privilege cannot be invoked to effect an illegal purpose. The exceptions preclude the possibility of the privilege being used contrary to the public interest. But those exceptions offer no analogy to the present case.

However, Counsel's submission is supported by the judgment of Caulfield J in *Reg. v. Barton* [1973] 1 WLR 115 at 118; [1972] 2 All ER 1192 at 1194:

> the principle I am going to enunciate is not supported by any authority that has been cited to me, and I am just working on what I conceive to be the rules of natural justice. If there are documents in the possession or control of a solicitor which, on production, help to further the defence of an accused man, then in my judgment no privilege attaches. I cannot conceive that our law would permit a solicitor or other person to screen from a jury information which, if disclosed to the jury, would perhaps enable a man either to establish his innocence or to resist an allegation made by the Crown.

The view which his Lordship embraced would have some validity if legal professional privilege be regarded simply as an individual right. And Lord Denning MR apparently approved of *Barton* in *D. v. National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 190. But if the purpose of the privilege is to facilitate the application of the rule of law in the public interest, it is not possible to allow the interest of an individual accused to destroy the privilege which is conferred to advance that public interest.

An exception which permits a person charged with a criminal offence to compel production or evidence or privileged communications would not only be out of harmony with the purpose of the privilege; it would also permit absurd anomalies. The clearest illustration is the case where two are charged as parties to the same crime and at trial each seeks to exculpate himself by inculpating the other. If the exception were allowed, each would be entitled to compel production of the other's communications with his solicitor and Counsel. This scenario led the Ontario Court of Appeal in *Reg. v. Dunbar and Logan* [1982] 138 DLR (3d) 221 at 251; (see also at 252) to say:

> One limitation of the wide principle enunciated by Caulfield J that suggests itself is that an accused ought not to be required to disclose privileged information, the disclosure of which might assist a co-accused to the detriment of the accused who is required to disclose the privileged communication.

But that is not the only anomalous situation that could be envisaged. Would a person charged with a minor criminal offence be entitled to breach the confidentiality of a professional consultation of another person on a matter of great moment? And, if an exception were admitted in favour of an accused person, it would be unfair not to admit a like exception in favour of the Crown.

The proposed exception is flawed both in principle and in practice. I would not admit an exception allowing a person charged with a criminal offence to breach the legal professional privilege attaching to another person's communication with his legal adviser unless that other person waives the privilege. It follows that I would dismiss the appeal.

Deane J:

Mr. Louis James Carter ("the appellant") awaits trial by jury in the Supreme Court of Western Australia on an indictment charging him with conspiracy to defraud the public and with four other offences. By subpoenas served upon one or other of the respondents, he sought production to the Supreme Court of documents to which he desires access for the purposes of his defence on his trial. In pre-trial proceedings in the Supreme Court, Seaman J upheld objections taken to the production of some of the documents, ruling that they were protected from production and inspection by legal professional privilege. An appeal by the appellant to the Full Court of the Supreme Court (Malcolm CJ, Rowland and Franklyn JJ) was unanimously dismissed. The appellant now appeals to his Court from the judgment of the Full Court.

The relevant documents were all brought into existence solely for the purpose of the giving of confidential legal advice by a qualified legal practitioner acting in his or her professional capacity. It is common ground that they all fall within the ambit of legal professional privilege which *prima facie* attaches to any confidential oral or recorded communication or any document (or other material) which has been made or brought into existence for the sole purpose of seeking or giving legal advice or being used in existing or anticipated litigation. The only issue between the parties on the appeal is in relation to a question of pure law which can be stated in abstract terms, namely, whether there is a right in an accused person on or awaiting trial to the production of, and access to, documents which may establish his or her innocence or materially assist in his or her defence notwithstanding that the documents would otherwise be protected from production and access by legal professional privilege. If that question is answered in the negative, the appeal must be dismissed. If it be answered in the affirmative, the appellant seeks orders that the judgment of the Full Court be set aside and that the matter be remitted to the Supreme Court so that, subject to a Judge satisfying himself or herself by inspection or otherwise that the documents may establish the appellant's innocence or assist in his defence, he and his legal representatives may be given access to them.

Seaman J at first instance and Rowland J in the Full Court (Malcolm CJ and Franklyn J agreed with Rowland J's analysis of the case) each examined in some detail the current state of authority and concluded that the effect of the cases in this Court was that the respondents' claim of legal professional privilege must be upheld even if it be assumed that the subpoenaed documents might materially assist the appellant on his trial. I agree with their Honours' analysis of authority and with that conclusion. The importance of the question involved in the appeal leads me to expand upon what their Honours have written in that regard.

Legal professional privilege has been accepted by the common law as "unquestioned" since at least the second-half of the sixteenth century (See *Wigmore on Evidence*, McNaughton rev. (1961), Vol. 8, §2290 at 542, and the cases cited in n. 1 thereof; Holdsworth, *A History of English Law*, 3rd Edn. (1944) Vol. 9, at 201-202). By the late eighteenth century, when the common law accompanied the first European migrants to this country, the modern rationale of the privilege, as the client's and not the attorney's privilege, had been recognized and firmly established. That modern rationale was concisely identified by Dean Wigmore (*op. cit.*, §2291 at 545):

> In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent.

In accordance with it, the privilege extends to protect the client, as well as the legal adviser, from being compelled to disclose confidential communications about legal matters.

In the Courts below, both Seaman J and Rowland J correctly pointed out that a majority of this Court in *Baker v. Campbell* [1983] 153 CLR 52 at 88, 95-96, 116-117, 131-132. (And see also, e.g., *Attorney-General (NT) v. Maurice* [1986] 161 CLR 475 at 480, 190-491) clearly accepted that legal professional privilege is not a mere rule of evidence but is a substantive and fundamental common law principle. Indeed, that acceptance constituted the basis of the actual decision in that case which was to the effect that the doctrine was not confined to judicial and *quasi*-judicial proceedings but protected documents subject to the privilege from seizure pursuant to a search warrant duly issued under s. 10 of the Crimes Act 1914 (Cth). To no small extent, legal professional privilege, like the privilege against self-incrimination, is an established facet of our adversarial system of justice. In the context of the complicated electronic and sophisticated forms of criminal activity which pervade modern society, it may be arguable that the adversarial system of administering criminal justice itself requires re-examination and at least some modification. While the adversarial system remains, however, legal professional privilege is of fundamental importance in the administration of justice. It "promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline" (*Grant v. Downs* [1976] 135 CLR 674 at 685 per Stephen, Mason and Murphy JJ). It plays an essential role in protecting and preserving the rights, dignity and freedom of the ordinary citizen - particularly the weak, the unintelligent and the ill-informed citizen - under the law (See, generally, *Attorney-General (NT) v. Maurice* [1986] 161 CLR at 490).

Where legal professional privilege attaches, there is no question of balancing the considerations favouring the protection of confidentiality against any consideration favouring disclosure in the circumstances of the particular case. The privilege itself represents the outcome of such a balancing process and reflects the common law's verdict that the considerations favouring the "perfect security" of communications and documents protected by the privilege must prevail. The common law's verdict in that regard was explained by Knight Bruce V.C. in a judgment (*Pearse v. Pearse* [1846] 1 De G & Sm 12 at 28-29 [63 ER 950 at 927) which Lord Selborne LC was later to describe (*Minet v. Morgan* [1873] 8 Ch App 361 at 368) as "one of the ablest judgments of one of the ablest Judges who ever sat in this Court":

> The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination. Truth, like all other good things, may be loved unwisely - may be pursued too keenly - may cost too much. And surely the meanness and the mischief of prying into man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place, and which, unless in a **condition of perfect security,** must take place uselessly or worse, are too great a price to pay for truth itself. (Emphasis added)

The point that legal professional privilege is itself the outcome of a balancing process and is conclusive when it attaches has also been made in a number of recent judgments in this Court. Thus, in *Waterford v. The Commonwealth,* Mason and Wilson JJ said [1987] 163 CLR 54 at 64-65:

> If the conditions giving rise to legal professional privilege are satisfied, and the privilege is not waived, then the document is not disclosed. ... Legal professional privilege is itself the product of a balancing exercise between competing public interests whereby, subject to the well-recognized crime or fraud exception (cf. *Reg. v. Bell; Ex parte Lees* [1980] 146 CLR 141), the public interest in 'the perfect administration of justice' (per Earl of Halsbury LC in *Bullivant v. Attorney-General (Vict.)* [1901] AC 196 at 200) is accorded paramountcy over the public interest that requires, in the interests of a fair trial, the admission in evidence of all relevant documentary evidence. Given its application, no further balancing exercise is required.

To the same effect is the following extract from the judgment of Dawson J in *Attorney-General (NT) v. Kearney* [1985] 158 CLR 500 at 532. (And see also *Baker v. Campbell* [1983] 153 CLR at 95-96; *Waterford v. The Commonwealth* [1987] 163 CLR at 74, 98-99):

> More importantly, once it (i.e. legal professional privilege) is claimed it is conclusive, provided that the relevant communication does not fall within the recognized exceptions. It is not for the Court to enter upon a balancing exercise as in the case of Crown privilege in order to determine where the public interest lies in the individual case. It is established that as a matter of principle the public interest lies in preserving the confidentiality of those communications falling within the ambit of the doctrine.

As Dawson J's reference in the above passage to "the recognized exceptions" suggests, legal professional privilege is subject to a number of established and settled "exceptions". In particular, the privilege does not extend to communications or documents made or brought into existence for the purpose of, or as part of the process of, crime, fraud, abuse of statutory powers or, in some circumstances, defeating or frustrating the administration of justice by the Courts. For present purposes, a critical characteristic of those "exceptions" is that they are exclusions from the reach of legal professional privilege rather than exceptions to the scope of the protection which it affords. They are directed to circumstances in which the privilege does not attach with the result that the particular communication or document is not protected by legal professional privilege at all. They are not directed to circumstances in which, notwithstanding that legal professional privilege does attach, the Courts will override the privilege and order that the privileged document be produced for inspection or that the privileged communication be disclosed. Nor, in accordance with what has been said above, are they directed to identifying circumstances in which the Courts will embark upon a balancing process to determine whether the considerations favouring disclosure outweigh the considerations favouring confidentiality. In that regard, the established position in this country is that, in the absence of waiver or loss of confidentiality and subject to one apparent (and, in my view, anomalous) qualification in relation to wardship or custody proceedings. (The obligation to provide privileged information (including the client's address) to a Court to enable discovery of the whereabouts of a ward of Court or an infant in respect of whom a custody order has been made: see, e.g., *Reg. v. Bell; Ex parte Lees* [1980] 146 CLR 141 at 145-146. But note that, even in such cases, it may be arguable that that is because the privilege does not attach or "apply" to information about a name or address in other than exceptional circumstances: cf. *ibid.* at 155. It should also be noted that the judgments in *Bell* were written some three years earlier than *Baker v. Campbell*, which established that legal professional privilege was a fundamental principle in this country and not just a rule of evidence. The reasoning in the judgments in *Bell* must be seen in that context), the protection which legal professional privilege accords to the communications or documents to which it actually attaches is, for so long as that attachment persists, unqualified. (See, e.g. *Baker v. Campbell* [1983] 153 CLR at 86-87, 95-96, 112, 127-129; *Waterford v. The Commonwealth* [1987] 163 CLR at 64-46, 74, 98). And there is a powerful reason why that is so. I turn to identify it.

As has been seen, the focus of the modern theory of legal professional privilege is upon the removal of "apprehension" of compelled disclosure: "the necessity of *providing subjectively for the client's freedom of apprehension* in consulting his legal adviser", (Wigmore, *op. cit.*, §2290 at 543. The emphasis is the author's). The achievement of that "necessity" is not frustrated by the established exclusions in the form of particular identified circumstances in which legal professional privilege will not attach. Those circumstances can be identified in advance and the client can be advised that, provided they do not exist at the time when the relevant communication or document is made or comes into existence, legal professional privilege will attach to it and will, in the absence of waiver or loss of confidentiality, provide conclusive protection in the future subject only to the possible qualification in respect of wardship or custody proceedings. In contrast, if the privilege could be overridden by the Courts by reason of the outcome of some subsequent balancing process or whenever particular circumstances arise in subsequent litigation, an assurance of confidentiality could never be given and the "necessity" for "the client's freedom of apprehension" could never be fully achieved.

Apart from an apparently approving reference to the English case of *Reg. v. Barton* [1973] 1 WLR 115 in the dissenting judgment of Gibbs CJ in *Baker v. Campbell* [1983] 153 CLR at 68, the many general statements in judgments in this Court about the applicability and scope of legal professional privilege, and the settled exclusions therefrom, contain no suggestion that the privilege either does not apply at all or applies only to a qualified extent in relation to criminal proceedings. To the contrary, any such suggestion would be quite inconsistent with the overall effect of those judgments. Nonetheless, it was submitted on behalf of the appellant that the Court should breach the general protection which legal professional privilege accords to communications and documents to which it has attached by holding that the privilege is overridden in any case where the protected communication or document may materially assist in the defence of the accused in a criminal trial. In support of such an alteration to the common law of this country, the appellant points to the judgment of Caulfield J in *Reg. v. Barton* [1973] 1 WLR 115 in which his Lordship declined to set aside a subpoena *duces tecum* which had been served on behalf of the accused in a criminal trial in Lincoln Crown Court. The central passage in Caulfield J's judgment reads as follows (*ibid.* at 118):

> I think the correct principle is this, and I think that it must be restricted to these particular facts in a criminal trial, and the principle I am going to enunciate is not supported by any authority that has been cited to me, and I am just working on what I conceive to be the rules of natural justice. If there are documents in the possession or control of a solicitor which, on production, help to further the defence of an accused man, then in my judgment no privilege attaches. I cannot conceive that our law would permit a solicitor or other person to screen from a jury information which, if disclosed to the jury, would perhaps enable a man either to establish his innocence or to resist an allegation made by the Crown. I think that is the principle that should be followed.

The qualification of legal professional privilege contained in that passage has been subsequently accepted in some leading text books, (see, e.g., *Halsbury's Laws of England* 4th Edn. Vol. 17 para. 252, n. 3; *Cross on Evidence*, 6th Edn. (1985), at 399-400; *Cross on Evidence*, Aust. ed. (1991), Vol. 1, para. 25300; Archbold, *Criminal Pleading, Evidence & Practice*, (1993), Vol. 1, at 1573, para. 12-12). In my view, it should not be accepted in this country.

Four points should be made about the above passage from *Reg. v. Barton*. The first is that, as Caulfield J himself suggested, the "principle" which it adopted was unsupported by authority. Indeed, it was contrary to all general statements of authority in England and in

this country of which I am aware. The second is that the reason given to support that principle in the penultimate sentence ("I cannot conceive" etc.) would be equally applicable to override any claim to privilege regardless of its basis, including a witness' or co-accused's claim to privilege on the ground of self-incrimination, in respect of information of the designated kind on a criminal trial.

The third point which should be made about the above extract from Caulfield J's judgment is that the statement that no privilege "attaches" to documents which "help to further the defence of an accused man" cannot properly be seen as equating the suggested qualification with one or other of the recognized exclusions which preclude communications or documents made or brought into existence in certain circumstances from ever coming within the ambit of legal professional privilege. As has been said, those recognized exclusions do no defeat the rationale of legal professional privilege or undermine the protection of the confidentiality of communications or documents to which the privilege attaches. They operate only if the relevant circumstances exist at the time the relevant communication or document is made or comes into existence. If those circumstances exist at that time, there will simply be no privilege. If they do not exist at that time, the relevant exclusion is spent. Obviously, it would ordinarily be impossible to say *at that time* whether a particular communication or document might "help to further the defence of an accused man" on some subsequent criminal trial. That being so, it would seem that Caulfied J's statement that no privilege "attaches" must be understood as meaning not that legal professional privilege does not attach at all to the relevant communications or documents but that, notwithstanding that it has attached, it will be unavailing if and wherever the designated circumstances might subsequently arise. That means that the qualification would, if accepted, conflict with the rationale and undermine the efficacy of legal professional privilege by creating a necessarily unpredictable gap in the general protection which it accords to documents to which it has attached. It would convert an unqualified and conclusive privilege into a qualified and provisional one.

The final point to be made about the judgment in *Reg. v. Barton* is that, with respect, it addressed but one side of the argument in that it failed to advert to the fact that, as has been seen, legal professional privilege is a fundamental principle of the common law which has itself evolved from a balancing process between considerations favouring compulsory disclosure and other considerations (to which Caulfield J did not refer) favouring the preservation of complete confidentiality.

Clearly, there is force in the argument that legal professional privilege should, as a matter of policy, give way in any case, particularly a criminal case, in which a conclusion is reached that the considerations favouring the disclosure of privileged material in the particular circumstances of the particular case outweigh the considerations favouring the preservation of confidentiality. A possible answer to that argument may be that the cases in which the privilege significantly impedes the ascertainment of the truth are so exceptional that they do not justify its curtailment. A possible answer as regards suggested unfairness to the accused on a criminal trial may be that, in the hands of the skilled advocate, the refusal of access to the privileged communication or document is likely to be a more potent weapon than would the communication or document itself and that, if there ever were a case where it became apparent that refusal of access precluded a fair trial, it would be possible to invoke the inherent power of the Courts to stay proceedings. The compelling answer to the argument in this Court is, however, that which has already been indicated, namely, that the argument was considered and firmly rejected in the course of the development of the common law when it

was established, as a fundamental principle, that the confidentiality which should be afforded to communications and documents protected by legal professional privilege was, in the words of Fletcher Moulton LJ (*Rakusen v. Ellis, Munday & Clarke* [1912] 1 Ch 831 at 840):

> the very highest - so high that the solicitor is absolutely privileged and cannot be made to state what passed between him and his client. To that extent the solicitor is made, as it were, a part of his client for the purposes of those communications.

That fundamental principle is now so well entrenched in the common law of this country that it should not be overturned or significantly curtailed by the Courts, in the absence of compelling legal considerations. Indeed, so much has been expressly recognized on a number of occasions in this Court where it has been acknowledged that "legal professional privilege is so firmly entrenched in the law that it is not to be exercised by judicial decision" (See *Grant v. Downs* [1976] 135 CLR at 685 per Stephen, Mason and Murphy JJ; *O'Reilly v. State Bank of Victoria Commissioners* [1983] 153 CLR 1 at 23-24 per Mason J and 34-35 per Wilson J; *Baker v. Campbell* [1983] 153 CLR at 114 per Deane J. And see also *Waterford v. The Commonwealth* [1987] 163 CLR at 62 per Mason and Wilson JJ and 100 per Dawson J) and that, any curtailment of the operation of the privilege "is for the legislature, not the Courts", (*Baker v. Campbell* [1983] 153 CLR at 96 per Wilson J).

Accordingly, the question arises whether there are any compelling legal considerations which would justify this Court in curtailing the protection afforded by legal professional privilege by holding that the privilege is unavailing in any case where compulsory disclosure of the privileged communication or document is sought by person charged with a criminal offence and it appears that such disclosure might materially assist in his or her defence. In my view, the answer to that question is that there are not. It is true that one's instinctive reaction to the question whether an accused person should be given access to any material which might materially assist in his or her defence is an affirmative "of course". The more general considerations relating to the administration of justice which have been identified above and which have led the common law to reject that instinctive reaction are, however, extremely strong. Quite apart from those more general considerations, including the essential function served by legal professional privilege in our adversarial system of administering justice, there is the practical consideration that, if legal professional privilege were not completely secure, the likelihood is that the privileged communication or document would not be made or would not come into existence in the first place. Ultimately, much depends upon one's assessment of the extent of the detriment to the efficacy of legal professional privilege which would be likely to result from the proposed curtailment of the protection which it affords. In my view, that detriment could well be significant. As has seen, such a curtailment would reduce the conclusive and unqualified protection afforded by legal professional privilege to a provisional and qualified protection. Even more important, it would, in the administration of criminal justice, to some extent undermine the rationale of the privilege by precluding the removal of apprehension of compulsory disclosure which is its focus.

A person in need of legal advice in respect of an apprehended criminal charge will commonly, even if innocent, be implicated to some extent in the circumstances surrounding the alleged offence. If the professional advice is to be informed, it will often be inevitable that some damaging admissions will either deliberately or inadvertently be made. If the position were that any documents prepared by such a person for the information of his or her lawyer were susceptible to compulsory disclosure on the trial of another person, the competent lawyer would warn the client of that danger. A possible result of such a warning would be that no uninhibited written statement was made. If the lawyer's own note of any oral communication

was susceptible to such compulsory disclosure, the lawyer would be conscious of the danger to the client involved in the making or retaining of an uninhibited record. Even if communication between lawyer and client were confined to the completely oral, the danger would persist that the client and the lawyer could, if called to give evidence and subject to the limits of admissibility, be cross-examined about the content of the communication to the disadvantage of the client. Nor could reliance be placed upon the privilege against self-incrimination for protection in such circumstances since that privilege would offer no protection in respect of damaging admissions which, however injurious to standing, reputation and civil liability, did not tend to incriminate or in respect of incriminating documents or information in the possession of the legal adviser. (While the privilege against self-incrimination extends to the production of documents by the person who would be imperilled (see *Controlled Consultants Pty. Ltd. v. Commissioner for Corporate Affairs* [1985] 156 CLR 385 at 393; [1984] VR 137 at 152), it is difficult to see how it could, as a matter of principle, apply to the production of documents by that person's lawyers, bailee or agent since the "privilege is not a privilege against incrimination; it is a privilege against self-incrimination" (*ibid.*). See, e.g., *Rochfort v. Trade Practices Commission* [1982] 153 CLR 134 at 145; *Environment Protection Authority v. Caltex Refining Co. Pty. Ltd.* [1993] 178 CLR 477 at 504, 516, 535, 548-549; *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation* [1978] AC 547 at 637-638). In that regard, the suggested curtailment of legal professional privilege would inevitably, to some extent, also reduce the efficacy of the privilege against self-incrimination (cf. *Controlled Consultants Pty. Ltd. v. Commissioner for Corporate Affairs* [1985] 156 CLR at 393).

In these circumstances, the task of balancing the considerations favouring disclosure to an accused person in the postulated circumstances against the more general considerations favouring the "perfect security" of the protection afforded by legal professional privilege is a difficult one. There is not, however, any compelling legal consideration requiring rejection of the common law's entrenched conclusion that the outcome of that balancing process should be the complete protection of the privileged communication or document. It follows that I am not persuaded that this Court would be justified in curtailing the protection afforded by legal professional privilege in the manner sought by the appellant.

Moreover, there are some practical reasons why any such curtailment should be by legislative enactment rather than judicial decision. Such a legislative alteration of the common law would, one would expect, be made only after proper inquiry and informed advice about a variety of questions which would arise for essentially pragmatic decision. One such question would be whether the privilege should be overridden whenever disclosure of the protected material would materially assist in the defence of any person charged with a criminal offence, however minor (See, e.g., the apparently unqualified view expressed by the Australian Law Reform Commission, Report No. 38, *Evidence*, (1987) at 113, para. 195: "The privilege should not ... result in the withholding of evidence relevant to the defence of an accused"), or only pursuant to some new balancing process in which account could be taken of matters such as the seriousness of the alleged offence, the amount of material assistance to the defence which is likely to be derived from disclosure and the damage which disclosure might cause to the person entitled to the benefit of the privilege. Another question would be what, if any, provision should be made to seek to restrict the infringement of confidentiality to what is necessary in the interests of the particular accused and the open administration of justice by the Courts. Another is, whether, and to what extent, associated rights of access should be accorded to the Crown. For example, should the Crown be given access to privileged material produced at the behest of the accused and be entitled to destroy its confidentiality

by leading it in evidence on the trial in which it was produced if the accused decided not to rely on some or all of it? There are also several associated problems which would need to be addressed as a consequence of such a curtailment of the protection of legal professional privilege and which would be more appropriately addressed by the legislature. One such problem would be whether the arguments favouring a curtailment of the protection of legal professional privilege in the interests of the defence of a particular accused should also prevail, to some extent and subject to what were seen as appropriate safeguards, over the related privilege against self-incrimination (See, as to the relationship between legal professional privilege and the privilege against self-incrimination, Holdsworth, op.cit. at 201-203; *Baker v. Campbell* [1983] 153 CLR at 127-128), of a person who is not a co-accused on a joint trial. Another associated problem would be the extent to which, if at all, the curtailment of the protection of legal professional privilege should apply in circumstances where there are two or more persons charged with the same or related offences and compulsory disclosure by the legal adviser of one accused of privileged communications or documents would materially assist in the defence of another accused. If, in such circumstances, the privileged communications or documents of one accused were susceptible to compulsory disclosure to assist in the defence of another accused on a joint trial, legal professional privilege would have been effectively negated in some important areas of the administration of criminal justice. If, in such circumstances, compulsory disclosure were only available where there were separate trials, a question would arise about whether the disclosed material should be available to be used against the accused entitled to the benefit of the privilege on his trial and, if it should not, what steps could be taken to avoid the administration of criminal justice being brought into ridicule?

It should be mentioned that I have not, in the foregoing, referred to some recent decisions in common law Courts which support the proposition that the protection of legal professional privilege should be liable to be overridden in a criminal case if the Court concludes "that there is no ground on which the client could any longer reasonably be regarded as having a recognisable interest in asserting the privilege" (*Reg. v. Ataou* [1988] AB 798 at 807. See also *Reg. v. Craig* [1975] 1 NZLR 597 at 599; *Reg. v. Derby Magistrates Court; Ex parte B* [1994] TLR 538; *Cross on Evidence*, 6th Edn. (1985) at 394). The acceptance of that proposition would effectively subject a claim of legal professional privilege in a criminal Court to critical examination for the purpose of determining whether the client could "reasonably be regarded as having a recognisable interest", whatever that may mean (*Reg. v. Ataou* [1988] QB at 807 would seem to indicate that protection of reputation or a theoretical, but remote possibility of prosecution for perjury is not a "recognisable interest" for relevant purposes). It would, in my view, involve a significant curtailment of the protection which the privilege affords. It is unnecessary for the purposes of the present case that I express any view about whether such a proposition should be accepted in this country since it is not suggested that any of the respondents lacked "a recognisable interest in asserting the privilege". It should, however, be apparent from what has been written above that my present inclination is that any such curtailment of the protection of legal professional privilege should properly be seen as a matter for the legislature.

The appeal should be dismissed.

Toohey J:

The issue raised by this appeal is encapsulated in the notice of appeal to the Court. Referring to the judgment of the Full Court of the Supreme Court of Western Australia given on 15 July 1993, the ground of appeal asserts:

> The Court erred in not holding [that] there is a right in an accused person to production of documents which may establish the innocence of the accused person or may materially assist in his or her defence and that such right is an exception to legal professional privilege.

The Background

The appellant, Mr. Carter, has been indicted together with Mr. Connell and Mr. Lucas on a charge of conspiring with others

> to defraud the public by deceitfully concealing and falsely portraying the true financial position of Rothwells Limited so as to induce persons to do or continue to do business with or to refrain from taking action in relation to Rothwells Limited.

There are other charges in the indictment including four charges against Mr. Carter arising from his position as an auditor of Rothwells Limited ("Rothwells"). Those charges allege that Mr. Carter concurred in the publishing of annual reports and financial statements relating to Rothwells which were to his knowledge false in material particulars.

Mr. Carter's solicitors issued subpoenas addressed to the respondents for the production of documents. Each subpoena was issued in the criminal proceedings against Mr. Carter and required the recipient to attend at a hearing in the Supreme Court of Western Australia on 24 August 1992, pursuant to s. 611A of the Criminal Code (WA). That section empowers a Judge, who need not be the trial Judge, to determine questions of law or procedure in order to facilitate the preparation for or the conduct of a trial, at any time before a jury is sworn.

The respondent Northmore Hale Davy & Leake ("Northmore Hale") is a firm of solicitors which acts for the respondents Wardley Australia Limited ("Wardley") and Wardley Australia Securities Limited ("Wardley Securities"). Both companies were involved in the "rescue" of Rothwells from its financial difficulties. The State of Western Australia brought action in the Federal Court claiming damages from Wardley and Wardley Securities in connection with the rescue. The companies filed cross-claims against Mr. Connell and against KMG Hungerfords, of which Mr. Carter is a partner, claiming damages and contribution orders in respect of their involvement in the rescue and in relation to the accuracy of annual accounts of Rothwells. The respondent Mr. Pope is a partner in the accounting firm of Price Waterhouse, which firm was retained by the liquidator of Rothwells to prepare reports and provide advice in relation to certain audits of Rothwells by KMG Hungerford and to act as the liquidator's tax adviser in a particular matter pertaining to Rothwells.

It is unnecessary, for the purposes of this appeal, to detail the Rothwells rescue. However the subpoenas call for the production by the recipients of documents and other material relating to the rescue and to the financial affairs of Rothwells since October 1987. Additionally, the subpoenas to Mr. Pope and Price Waterhouse call for material relating to work done whilst engaged by Rothwells and, in the case of Mr. Pope, transcripts of evidence given by him to Mr. McCusker Q.C., as an inspector inquiring into the affairs of Rothwells, and also transcripts of evidence given by him to the National Companies and Securities Commission. The subpoenas to Northmore Hale, Wardley and Wardley Securities also call for material relating to the Federal Court action.

The response of each recipient of a subpoena was to take formal objection to the production of any document, particularly on the ground that some of the material sought was the subject of legal professional privilege. That objection has been refined by affidavits identifying categories of documents and particular documents claimed to be the subject of privilege. Otherwise, it appears, documents have been made available for inspection by Mr. Carter's solicitors. Northmore Hale, Wardley and Wardley Securities have claimed legal professional

privilege for a number of documents which came into existence for the purpose of the Federal Court proceedings. They object to the production of transcripts of evidence given by various persons to Mr. McCusker's inquiry, to the Royal Commission into Commercial Activities of Government in Western Australia, to the National Companies and Securities Commission and to the Australian Securities Commission, on the ground that this material was provided by those organisations to them on a confidential basis. Mr. Pope and Price Waterhouse have claimed legal professional privilege for documents relating to Price Waterhouse obtaining legal advice on behalf of the liquidator.

Mr. Carter does not dispute that the documents, to the production of which objection is taken, would ordinarily fall within the classification of legal professional privilege in that they were brought into existence for the purpose of giving advice, in some cases in relation to transactions the subject of charges in the indictment and in other cases relating to civil proceedings in which some of the respondents were involved. Mr. Carter's submission is that the privilege should yield where a person is facing criminal proceedings and the material may establish the innocence of that person or materially assist in his defence. The submission was rejected by Seaman J (*Reg. v. Connell* (No. 2) [1992] 8 WAR 148), the Judge before whom objection to the subpoenas was taken, and by the Full Court (Malcolm CJ, Rowland and Franklyn JJ).

The Rationale of Legal Professional Privilege

Mr. Carter acknowledges the absence of direct authority in Australia on the point he wishes to argue, except of course for the considered judgments of Seaman J and of the Full Court. There is however a body of authority in this country on the scope and operation of legal professional privilege and that must be the starting point for consideration of the issue presented to the Court.

Originally the privilege was based on the duty of the solicitor to respect professional confidences - "a consideration for *the oath and the honor* of the attorney rather than for the apprehensions of his client", (*Wigmore on Evidence*, McNaughton rev. (1961), Vol. 8 at para. 2,290). It was only in the eighteenth century that the explanation came to be found to be in the need for a client to obtain legal advice without being prejudiced. (*ibid. Baker v. Campbell* [1983] 153 CLR 52 at 93-94, 113-114, 126-127).

In a passage in *Grant v. Downs* [1976] 135 CLR 674 at 685. See also *Reg. v. Bell; Ex parte Lees* [1980] 146 CLR 141 at 152 per Stephen J, Stephen, Mason and Murphy JJ observed:

> The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision. Nonetheless there are powerful considerations which suggest that the privilege should be confined within strict limits.

The privilege has been described as an important element in the protection according to law of the privacy and liberty of the individual which is an essential mark of a free society (*Baker v. Campbell* [1983] 153 CLR at 95 per Wilson J) as of fundamental importance to the protection and preservation of the rights, dignity and equality of the ordinary citizen under the law (*ibid.* at 118, 120 per Deane J. See also *Attorney-General (NT) v. Maurice* [1986] 161 CLR 475 at 490 per Deane J; *Waterford v. The Commonwealth* [1987] 163 CLR 54 at 82 per Deane J) and as no less fundamental than the right which supports the privilege against self-incrimination (*Baker v. Campbell* [1983] 153 CLR at 127 per Dawson J). In New Zealand Cooke J has described legal professional privilege in criminal matters as involving "a strong sense that any person charged or in peril of a charge has a fundamental human right to professional advice" (*Reg.v. Uljee* [1982] 1 NZLR 561 at 569). Canadian decisions have identified the privilege as a fundamental civil and legal right (*Solosky v. The Queen* [1979] 105 DLR (3d) 745 at 760; *Reg. v. Littlechild* [1979] 108 DLR (3d) 340 at 347; *Descoteaux v. Mierzwinski* [1982] 141 DLR (3d) 590 at 60; *Geffen v. Goodman Estate* [1991] 81 DLR (4th) 211 at 232. The existence of the Canadian Bill of Rights at the time *Solosky* was decided should be noted). The widespread existence of the privilege is emphasised by the decision of the European Court of Justice in *A.M. & S. Europe v. Commission (ECJ)* [1983] QB 878. In delivering his opinion Mr. Advocate General Sir Gordon Slynn said (*ibid*. at 913):

> From this it is plain, as indeed seems inevitable, that the position in all member states is not identical. It is to my mind equally plain that there exists in all the member states a recognition that the public interest and the proper administration of justice demand as a general rule that a client should be able to speak freely, frankly and fully to his lawyer. ...
>
> Whether it is described as the right of the client or the duty of the lawyer, this principle has nothing to do with the protection or privilege of the lawyer. It springs essentially from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation; it springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks.

On the other hand there are judicial *dicta* which identify the privilege, not as an individual right but rather as a component of the "perfect administration of justice" (*Bullivant v. Attorney-General for Victoria* [1901] AC 196 at 200-201 per Earl of Halsbury LC; *Varawa v. Howard Smith & Co. Ltd.* [1910] 10 CLR 382 at 388-389 per Isaacs J; *Attorney-General (NT) v. Kearney* [1985] 158 CLR 500 at 532 per Dawson J). Indeed, in *Baker v. Campbell* [1983] 153 CLR at 67. Gibbs CJ said:

> On the other hand, the privilege exists for practical reasons, rather than to give effect to any basic principle such as that which supports the privilege against self-incrimination.

The Chief Justice went on to point out that the confidentiality of communications between solicitor and client is not absolute and that there are a number of circumstances in which evidence of a confidential communication will be recevied. And in the same case Mason J said (*ibid.* at 80-81):

> Legal professional privilege stands well apart from the privilege against self-incrimination, which rests on a more enduring foundation, one which has a pervasive presence in our system of criminal justice.

And in *Attorney-General (NT) v. Kearney* Wilson J spoke of "the importance of flexibility in the operation of a rule which is grounded in public policy", [1985] 158 CLR at 522.

The justification for legal professional privilege truly lies in those considerations to which Stephen, Mason and Murphy JJ refer in *Grant v. Downs,* (see fn. 60 above), that is in the enhancement of the administration of justice by facilitating the representation of clients by legal advisers to whom they may make full and frank disclosure in circumstances of confidentiality. That approach is an echo of what was said by Lord Brougham LC in *Greenough v. Gaskill* [1833] 1 My & K 98 at 103 [39 ER 618 621]. Lord Brougham LC's comments were endorsed by Sir George Turner VC in *Russell v. Jackson* where his Lordship said ([1851] 9 Hare 387 at 391 [68 ER 558 at 559-560]):

> It is evident that the rule which protects from disclosure confidential communications between solicitor and client does not rest simply upon the confidence reposed by the client in the solicitor, for there is no such rule in other cases in which at least equal confidence is reposed: in the cases, for instance, of the medical adviser and the patient, and of the clergyman and the prisoner. It seems to rest not upon the confidence itself, but upon the necessity of carrying it out.

The judgment in *Russell v. Jackson* has been referred to in other judgments of this Court (*Varawa v. Howard Smith & Co. Ltd.* [1910] 10 CLR at 389 per Isaacs J: *Reg. v. Bell; Ex parte Lees* [1980] 146 CLR at 153 per Stephen J; *Attorney-General (NT) v. Kearney* [1985] 158 CLR at 524 per Wilson J; see also *Re Kearney* [1984] 55 ALR 545 at 554 per Woodward and Neaves JJ).

Wigmore deals with Jeremy Bentham's attack on the privilege and concludes (*Wigmore on Evidence,* op. cit. at para. 2,291):

> It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.

This view was endorsed by Mason J in *O'Reilly v. State Bank of Victoria Commissioners* [1983] 153 CLR 1 at 25.

Important, indeed entrenched, as legal professional privilege is, it exists to serve a purpose, that is to promote the public interest by assisting and enhancing the administration of justice. It is not an end in itself.

The Administration of Justice

If the rationale for legal professional privilege is the administration of justice, a question inevitably arises as to whether the administration of justice is best served by a rule which, notwithstanding some exceptions as in the case of communications made for the purpose of committing or furthering a crime or fraud, generally accords solicitor and client communications protection from disclosure. The answer given (*Waterford v. The Commonwealth* [1987] 163 CLR at 64-65. See also *Grant v. Downs* [1976] 135 CLR at 685; *Baker v. Campbell* [1983] 153 CLR at 95-96, 105-106, 109; *Attorney-General (NT) v. Kearney* [1985] 158 CLR at 515-516, 532; *Attorney-General (NT) v. Maurice* [1986] 161 CLR at 487) is that legal professional privilege:

> is itself the product of a balancing exercise between competing public interests whereby, subject to the well-recognized crime or fraud exception, ... the public interest in 'the perfect administration of justice' ... is accorded paramountcy over the public interest that requires, in the interests of a fair trial, the admission in evidence of all relevant documentary evidence. Given its application, no further balancing exercise is required.

It is true that this statement was made in the context of an application under the Freedom of Information Act 1982 (Cth). But it is apparent that the principle is expressed in general terms. Nevertheless, the idea that the balancing of interests has been carried out once and for all rests uneasily with the fact that exceptions to the privilege have from time to time been recognised. They are dealt with later in these reasons.

While legal professional privilege was developed in the context of civil proceedings, it has been accepted by Australian Courts as applicable in criminal proceedings (*Baker v. Campbell*; *Reg. v. Cahill; Ex parte McGregor* [1985] 61 ACTR 7; *Cain v. Glass* [1985] 3 NSWLR 39; *Adams v. Anthony Bryant* [1986] 67 ALR 616. See also *Grofam Pty. Ltd. v. Australia and New Zealand Banking Group Ltd.* [1993] 117 ALR 669).

Faced with a formidable weight of authority against him, senior Counsel for Mr. Carter had necessarily to argue for the creation by this Court of an exception to the privilege in the interests of an accused. To this end Counsel pointed to the judgment of Caulfield J in *Reg. v. Barton* [1973] 1 WLR 115. The judgment was given in the course of a criminal trial and in relation to an application by a solicitor to set aside a subpoena to produce documents served on him by the defence, on the ground that the documents were the subject of legal professional privilege. In dismissing the application Caulfield J said (*ibid* at 118):

> If there are documents in the possession or control of a solicitor which, on production, help to further the defence of an accused man, then in my judgment no privilege attaches. I cannot conceive that our law would permit a solicitor or other person to screen from a jury information which, if disclosed to the jury, would perhaps enable a man either to establish his innocence or to resist an allegation made by the Crown. I think that is the principle that should be followed.

His Honour cited no authority in support of the principle he enunciated nor did he discuss the operation or implications of the principle.

In *Reg. v. Ataou* [1988] QB 798 the Court of Appeal allowed an appeal against conviction where, on charges of conspiracy to supply and supplying a controlled drug, the trial Judge refused to allow cross-examination of a witness about a statement he had made to his solicitors which was said to be favourable to the appellant and inconsistent with the witness' evidence at trial, unless the witness was prepared to waive his privilege. In so doing the Court referred to *Barton* by saying (*ibid* at 805):

> It is noteworthy that, as one would expect, Caulfield J was careful, in an uncharted sea, to confine himself to the facts before him.

The Court of Appeal referred to the New Zealand decision of *Reg. v. Craig* [1975] 1 NZLR 597 in which Cooke J acknowledged the importance of legal professional privilege but said (*ibid.* at 599):

> When a communication was originally privileged and in criminal proceedings the privilege is claimed, aganist the prosecution, in respect of evidence by the client originally concerned or his solicitor, the onus should be on the prosecution to show that the claim cannot be sustained. That might be done either by demonstrating that there is no ground on which the client could any longer be reasonably regarded as having a recognisable interest in asserting the privilege or that an established exception applies.

It is clear from what follows that in referring to "an established exception" Cooke J was referring to "fraud or crime". The Court of Appeal also quoted a passage from *Cross on Evidence* 5th Edn. (1979) at 286 which reads:

> A time may come when the party denying the continued existence of the privilege can prove that the party relying on it no longer has any interest to protect, as where the solicitor for the unsuccessful plaintiff in a civil action takes a statement from a witness who is subsequently prosecuted for perjury and the prosecution wishes to ask the solicitor what the witness said to him.

In the light of what was said by Cooke J in *Craig* and by Sir Rupert Cross, the Court of Appeal in *Ataou* formulated a principle in the following terms ([1988] QB at 807):

> When a communication was originally privileged and in criminal proceedings privilege is claimed against the defendant by the client concerned or his solicitor, it should be for the defendant to show on the balance of probabilities that the claim cannot be sustained. That might be done by demonstrating that there is no ground on which the client could any longer reasonably be regarded as having a recognisable interest in asserting the privilege. The Judge must then balance whether the legitimate interest of the defendant in seeking to breach the privilege outweighs that of the client in seeking to maintain it.

Neither *Craig* nor *Ataou* meets Mr. Carter's argument. *Craig* takes the matter no further than does *Ataou*, that is, it asserts that it may be possible to demonstrate "that there is no ground on which the client could any longer reasonably be regarded as having a recognisable interest in asserting the privilege" (*ibid*). And in *Craig* privilege was claimed, not by the Crown but against the prosecution. Mr. Carter does not contend that there is a privilege which has ceased to exist; he challenges the applicability of the privilege in his circumstances, that is, when the privilege is claimed against him in the preparation of his defence.

The passage in *Halsbury's Laws of England*, 4th Edn., reissue, Vol. 11(2) at para. 1,163: "In a criminal trial the privilege is not absolute, in that documents which help to establish the innocence of an accused will not be privileged from disclosure" is not supported by *Ataou*, one of the authorities cited and, in the form expressed, is not supported by any decision other than *Barton*. The principle to be extracted from these cases is more cautiously stated in *Cross on Evidence* Aust. Edn. (1991), Vol. 1 at para. 25,300:

> It is probably not correct to say that legal professional privilege can never be used to protect a document which an accused person requires for his defence *(AG (NSW) v. Findlay* [1976] 9 ALR 521 at 522; *Reg. v. Cahill; Exparte McGregor* [1985] 61 ACTR at 13; *Adams v. Anthony Bryant & Co. Pty. Ltd.* [1986] 67 ALR 616; 8 ATPR 47-922 (Fed. Ct.)). Whether in any given case this privilege will be overridden by the interests of an accused person will depend upon the circumstances of the case, including the materiality of the document to the issues raised *bona fide* by the defence (*Cain v. Glass* [1985] 3 NSWLR 39).

In *Cain v. Glass*, Lusher J held that the privilege may be claimed by the prosecution in respect of documents brought into existence for the purpose of obtaining legal advice with a view to litigation. It therefore provides no support for the proposition in question. (In *Adams v. Anthony Bryant & Co. Pty. Ltd.* [1986] 67 ALR 616 Wilcox J upheld a claim of privilege on behalf of the Trade Practices Commission in relation to witnesses' statements in the prosecution brief to advise. In *Grofam Pty. Ltd. v. Australia and New Zealand Banking Group Ltd.* [1993] 117 ALR 669 the Full Court of the Federal Court upheld a claim of privilege by the Commonwealth Director of Public Prosecutions in respect of documents obtained by the DPP for the purpose of giving legal advice to the Australian Taxation Office).

Exceptions to Legal Professional Privilege

There can be no doubt that the Court is being asked to create an exception to legal professional privilege in criminal cases on a wider basis than that the interest sustaining the privilege has ceased to exist. The respondents contend that acceptance of the arguments in

favour of creating such an exception necessarily undermines a principle of general application which has been affirmed by the Courts so often. The matter was put in strong terms by Stephen, Mason and Murphy JJ in *Grant v. Downs* when they said ([1976] 135 CLR at 685. See also *Baker v. Campbell* [1983] 153 CLR at 96; *Attorney-General (NT) v. Maurice* [1986] 161 CLR at 491):

> As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision.

However, as already mentioned, there are exceptions to the privilege. Their existence is referred to by Gibbs CJ in *Baker v. Campbell* [1983] 153 CLR at 67 and include waiver of privilege, fraud and what his Honour describes as "the rather remarkable rule" that if the privileged document or a copy of it has been obtained by the opposing party "by accident, trickery, or even by theft" it may be given in evidence. In *Waterford v. The Commonwealth* Dawson J said [1987] 163 CLR at 99:

> In *Attorney-General v. Kearney* disclosure was held by the majority to be required by extending the accepted exceptions to the doctrine of legal professional privilege ... to encompass an abuse of statutory power. ... So to extend the recognised exceptions seemed to me to reopen, in effect, the question of public interest from case to case, a question which had hitherto been concluded in favour of confidentiality. To do so, in my view, tended to destroy the certainty required for the effective operation of legal professional privilege. ... However, my view did not prevail and I must accept that the exceptions to [the] privilege are wider than I previously thought.

In *Attorney-General (NT) v. Kearney* [1985] 158 CLR 500 a majority of the Court (Gibbs CJ, Mason, Wilson and Brennan JJ) held that communications between officers of the Northern Territory government and the government's legal advisers for the purpose of obtaining and giving legal advice relating to the making of regulations were not the subject of legal professional privilege. Essentially the reason for refusing the privilege was because the Northern Land Council had established a *prima facie* claim that the communications came into being as part of a scheme to defeat Aboriginal land claims and that it was contrary to the public interest in the better administration of justice to allow the privilege to be used to protect communications made to further a deliberate abuse of statutory power and by that abuse to prevent others from exercising their rights under the law.

Gibbs CJ said (*ibid.* at 515):

> In my opinion the present case comes within the principle which forms the basis of the rule that denies privilege to communications made to further an illegal purpose.

Mason and Brennan JJ concurred with the reason given by the Chief Justice. Wilson J said (*ibid.* at 525-526):

> I think it wholly inconsistent with the reason for the privilege that it should protect a government's deliberate abuse of its statutory powers. In this regard, the exception for fraud should be understood in the broad manner described by Goff J in *(Crescent Farm Crescent Farm (Sidcup) Sports Ltd. v. Sterling Offices Ltd.* [1972] Ch 553 at 565). It includes all forms of dishonesty, including 'trickery and sham contrivances'.

There are statements in judgments of this Court which show that the balance may be tipped against the privilege, where for instance a party to matrimonial proceedings has failed to comply with a custody order and taken a child into hiding. In those circumstances there is

a public interest both in securing the welfare of the child and in ensuring that an order made to secure that welfare is not deliberately flaunted (*Reg. v. Bell; Ex parte Lees* [1980] 146 CLR at 146-147 per Gibbs J; 153-154 per Stephen J).

A further substantial qualification to the privilege has emerged in England in the area of family law. Perhaps the high water mark is the decision of the Court of Appeal in *Oxfordshire County Council v. M* [1994] 2 All ER 269 where, in care proceedings, a party was ordered to disclose the report of a psychiatrist which was unfavourable to the party. It is true that the Court of Appeal emphasised that the proceedings were not adversarial and it was the Court's duty to investigate and to arrive at a result which was in the interests of the child. Nevertheless the Court of Appeal did recognise a further qualification to legal professional privilege and in the course of his judgment Steyn LJ commented (*ibid.* at 280):

> The rationale of the privilege is that without it a party's access to justice will be undermined. It is therefore an auxiliary principle buttressing the constitutional right of access to justice. On the other hand, the privilege contemplates that relevant evidence will sometimes be withheld from the Court. It must be therefore kept in justifiable bounds.

In *Baker v. Campbell* [1983] 153 CLR at 69 Gibbs CJ spoke of the privilege as being "in conflict with another principle of equal importance, namely, that all evidence which reveals the truth should be available for presentation to the Court". Likewise, in the same case Mason J said (*ibid.* at 74-75):

> Notwithstanding strong judicial assertions of the value of the public interest said to be promoted by the privilege - for the most part assertions made a century ago ... it is by no means self-evident that the value of this public interest is greater than the public interest in facilitating the availability of all relevant materials for production in litigious disputes.

In *Waugh v. British Railways Board* [1980] AC 521 the House of Lords rejected a claim of privilege in respect of an internal inquiry report into an accident, holding that the due administration of justice strongly required that the report be disclosed as almost certainly the best evidence of the cause of the accident. For that important public interest to be overridden by a claim of privilege, the purpose of submission to the Board's legal advisers must be at least the dominant purpose for which it had been prepared. Lord Simon of Glaisdale observed (*ibid* at 536-537):

> I can see no intrinsic reason why the one principle rather than the other should prevail in a situation where they are counter-indicative. Neither is absolute: both are subject to numerous exceptions. ... There is, then, no *a priori* reason why the one general principle should yield to the other.

Under ordinary circumstances confidentiality attaches to the identity of police informants but it will yield where disclosure of the information is necessary or desirable to show a person's innocence (*Marks v. Beyfus* [1890] 25 QBD 494). The principle has been extended in the case of an informant to the National Society for the Prevention of Cruelty to Children (*D v. NSPCC* [1978] AC 171). Lord Simon of Glaisdale spoke of the need to preserve the anonymity of informants but added this rider (*ibid* at 232-233 See also *Cain v. Glass (No. 2)* [1985] 3 NSWLR 230 at 246-253 per McHugh JA):

> The public interest that no innocent man should be convicted of crime is so powerful that it outweighs the general public interest that sources of police information should not be divulged, so that, exceptionally, such evidence must be forthcoming when required to establish innocence in a criminal trial.

It may be said that the disclosure of the identity of informants is in a different area of discourse to legal professional privilege. That may also be claimed in the case of the confidentiality attached to material by reason of public interest immunity. But, as Lord Simon said in *D v. NSPCC* (*ibid* at 233):

> The various classes of excluded relevant evidence may for ease of exposition be presented under different colours. But in reality they constitute a spectrum, refractions of the single light of a public interest which may outshine that of the desirability that all relevant evidence should be adduced to a Court of law.

I have spent considerable time on the authorities in this Court and elsewhere in order to record the great importance attached to legal professional privilege but also to emphasise the limits that have been established. It is of course possible to debate whether all these limits are truly exceptions to the privilege. But what the authorities demonstrate is that the privilege is one aspect of the public interest in its various manifestations and that it has from time to time been required to yield to other aspects of that interest. The entitlement of an accused to a fair trial in which all information tending to establish innocence is forthcoming is one of those aspects.

The Exception Contended for

While legal professional privilege is well established as the product of a balancing exercise between competing public interests, it may seem somewhat paradoxical that "the perfect administration of justice" should accord priority to confidentiality of disclosures over the interests of a fair trial, particularly where an accused is in jeopardy in a criminal trial for a serious offence.

In the present case senior Counsel for Mr. Carter rejected any suggestion that he was contending for a case by case approach. Such an approach would indeed undermine the privilege. And, although there was some ambivalence in the argument, I do not think that Counsel sought a balancing process. Rather, the emphasis was on the need for a general exception to the protection accorded by the privilege where disclosure would assist the defence in a criminal trial. An exception created in such broad terms would certainly be at odds with generally accepted notions of legal professional privilege. As well, there are a number of difficulties involved in the operation of such an exception. If its justification is the search for truth, it may be hard to deny the logic of refusing it to the Crown in criminal proceedings. Under our system of law, a criminal trial is an adversarial proceeding and the notion of a fair trial depends on the effective functioning of that system and established rules of procedure and evidence (*Jago v. District Court (NSW)* [1989] 168 CLR 23). But the proper interests of an accused do stand in a special position and this, I think, tends to answer any such claim. In any event the position of the Crown is not the subject of this appeal.

It must be recognised that the application of such an exception may well cause unfairness to the author of the document to which the privilege otherwise attaches or to persons to whom the document relates. In particular, it may expose a person to criminal proceedings unless the privilege against self-incrimination is held to override all other considerations. (For recent discussions of the privilege against self-incrimination, see *Trade Practices Commission v. Abbco Ice Works Pty. Ltd.* [1994] 123 ALR 503 at 539-543 per Gummow J; *Registrar v. Craven* [1994] 126 ALR 668 at 684-686 per Kirby P).

The subpoenas issued on behalf of Mr. Carter are subpoenas to named persons to attend at the Supreme Court and to bring with them and produce documents answering the descriptions in the extensive categories of documents listed. Although it is no doubt implicit, the terms

of each subpoena do not call upon each person to produce documents in his possession or power. It is apparent from the judgment of Seaman J that two of the persons subpoenaed, Mr. Yonge and Mr. Pope, will be called as prosecution witnesses on Mr. Carter's trial but it does not appear whether this is so in the case of the others subpoenaed.

The statements of witnesses in the prosecutor's brief may be ordered to be disclosed to the defence on committal proceedings and, speaking generally, a Court may make such orders as are necessary for the proper conduct of a summary criminal trial (*Barton v. The Queen* [1980] 147 CLR 75). In *Cain v. Glass* (No. 2) [1985] 3 NSWLR 230 the Court of Appeal held that it is open to a Magistrate in committal proceedings to require the disclosure of the identity of an informer if the production of that evidence will assist the accused to destroy the making of a *prima facie* case or to make out his case under the Justices Act 1900 (NSW), s. 41(6). At trial a Court may order the prosecution to produce witness statements to the defence (*James Clark* [1930] 22 Cr App R 58; *Mahadeo v. The King* [1936] 2 All ER 813; *Reg. v. Hall* [1958] 43 Cr App R 29; *Reg. v. Xinaris* [1955] 43 Cr App R 30; *Reg. v. Charlton* [1972] VR 758; *Maddison v. Goldrick* [1976] 1 NSWLR 651. And a prosecutor has a duty to present conflicting witness statements to the accused's legal representatives *Berry v. The Queen* [1992] 2 AC 364 at 372-377).

These matters are not directly relevant to the issue but they serve to point to situations in which emphasis is placed on the need for the Court to have the facts and for an accused not to be unduly hampered in the presentation of his or her defence. However, what Mr. Carter seeks to do is to have those persons subpoenaed produce to the Court (at which point no doubt he would then seek access to the documents subpoenaed) the documents referred to in the subpoenas, notwithstanding that they contain advice given by solicitors to their clients, requests for that advice, proofs of evidence for the purpose of Federal Court proceedings and reports obtained from accountants for the purpose of those proceedings. Seaman J commented ([1992] 8 WAR at 151):

> Mr. Barker asserts that all the documents for which privilege has been claimed go to matters important to the charges against the accused Carter and tend to establish his innocence.

It does not appear that Counsel has taken any steps to make good that proposition, albeit that no precision may be possible in the absence of the documents themselves. That is perhaps because the point at issue has been argued on a more theoretical basis, namely, whether an exception from legal professional privilege exists in the case of criminal proceedings.

Questions and Answers

There are perhaps two questions to be answered. The first is whether the administration of justice, in particular the public interest that all relevant evidence should be before the Court, outshines the protection of solicitor and client communications, at least where the interests of an accused require disclosure. If the answer to that question is yes, the second question is whether the weight of authority is such that the exception for which Mr. Carter contends should abide legislative change.

For the reasons given in this judgment, I would answer "yes" to the first question, though in qualified terms. The privilege against self-incrimination is a basic tenet of our law, at least in the case of individuals *Environment Protection Authority v. Caltex Refining Co. Pty. Ltd.* [1993] 178 CLR 477. It must prevail. Public interest immunity might well provide a further qualification. I would express the relevant principle somewhat in this way:

> Where an accused facing trial satisfies the Court that the production of documents subpoenaed by the accused is necessary for the proper conduct of his or her defence, then, subject to any proper objection that may be taken, other than on the ground of legal professional privilege, the Court may order the production of those documents.

It is true that a principle expressed in those terms leaves questions unanswered. That is inevitable. Doubtless it has difficulties, both in principle and practice. The exception speaks of a person facing trial and therefore says nothing as to summary proceedings. It does not define proper objection though clearly that includes self-incrimination. It is arguable that the notion of a fair trial involves the interests of the Crown as well as the accused so that any such exception should be available to the Crown. But, as suggested earlier, an accused does stand in a special position since he or she is the one in jeopardy. There are undoubtedly problems where a co-accused is involved (see *Reg. v. Dunbar and Logan* [1982] 138 DLR (3d) 221 at 251 where the Ontario Court of Appeal suggested that one limitation of the principle in *Reg. v. Barton* is that "an accused ought not to be required to disclose privileged information, the disclosure of which might assist a co-accused to the detriment of the accused who is required to disclose the privileged communication)". As formulated, the exception throws the onus on the accused of satisfying the Court that the documents are necessary for the proper conduct of the defence though the accused may be at a disadvantage in satisfying that onus. In that respect, if some onus is not placed on the accused, there is a real risk that the curial process may be frustrated by fishing expeditions. These matters serve to show the need for expressing the principle no more widely than is necessary to meet the circumstances of the present case.

On a practical level the Court can protect the interests of the person who is required to produce documents the subject of privilege by controlling access to the documents (see *Reg. v. Saunders* unreported decision of Henry J in the English Central Criminal Court sitting at Southwark, 10 January 1990) and by ordering the accused to deliver up all the material produced at the end of the proceedings and restraining the use of the material for any purpose other than the proceedings (see *British Coal Corporation v. Dennis Rye Ltd*. [1988] 1 WLR 1113). Clearly enough, if the principle is accepted there will have to be a working out of its implementation.

Any qualification to legal professional privilege inevitably gives rise to a concern as to the effect on the openness of discussions between lawyer and client. This is not something capable of assessment though it must be taken into account in the working out of any such qualification. But, in such general terms, it can hardly stand as a reason in itself for refusing access to material which may be crucial to the defence of an accused person.

What of the second question? It is true that in *Grant v. Downs* [1976] 135 CLR at 685 Stephen, Mason and Murphy JJ said that legal professional privilege was not to be exorcised by judicial decision. But recognition of the exception for which Mr. Carter contends is not destructive of legal professional privilege. It requires the privilege to yield in particular circumstances. And, as the authorities referred to in this judgment make abundantly clear, there is a public interest in Courts having all relevant material. Furthermore, as many of those authorities make equally clear, legal professional privilege should be confined within strict limits and from time to time it has been required to yield to some more important interest. While acknowledging the force of the argument that legislative action is the appropriate way to deal with any change to the scope of legal professional privilege, this Court is required to answer the question posed by the ground of appeal. It must do so in a context where there

is tension between two important strands in the development of the common law. It is consistent with the function of this Court in the development of that law to answer the question in the way indicated.

I would therefore allow the appeal to the extent of setting aside the orders of the Full Court and of Seaman J upholding the respondents' objection to production of the documents subpoenaed. I would remit the matter to a Judge of the Supreme Court of Western Australia to deal with the subpoenas in the light of this judgment.

Gaudron J:

I agree with Toohey J, for the reasons his Honour gives, that it should now be recognized that there is an exception to legal professional privilege in favour of an accused person in a criminal trial. It follows that I agree with the order which his Honour proposes. I wish, however, to add some remarks on the exception which, in his Honour's view, covers "documents ... necessary for the proper conduct of [the accused's] defence".

I would prefer to express the exception in terms of documents the withholding of which would impede the conduct of the defence, as was done with respect to the public interest privilege considered in *The Commonwealth v. Northern Land Council* [1993] 176 CLR 604 at 618. (The case was concerned with documents evidencing the deliberations of Cabinet on matters which remained current or controversial). It seems to me that this formulation is required by the presumption of innocence; the fact that, in our adversarial system of criminal justice, the prosecution bears the onus of proving guilt beyond reasonable doubt; and, as well, by the various matters which necessitate the recognition of the exception.

There is a further reason for expressing the exception in terms of impeding the conduct of the defence. Inevitably, it will be for the accused to show that the documents that he or she wants are within the exception. That is a formidable task when, as will inevitably be the case, the contents of the documents are not known. The position was put succinctly by La Forest J in *Carey v. Ontario* [1986] 2 SCR 637; [1986] 35 DLR (4th) 161 in relation to a suggested requirement that the plaintiff show "some concrete ground for belief" that privileged documents would assist his case. His Lordship said of that requirement where the documents were admittedly relevant and were covered by public interest privilege (*ibid.* at 678; 192. This passage was quoted by Toohey J in *The Commonwealth v. Northern Land Council* [1993] 176 CLR 604 at 635):

> What troubles me about this approach is that it puts on a plaintiff [the] burden of proving how the documents, which are admittedly relevant, can be of assistance. How can he do that? He has never seen them; they are confidential and so unavailable. To some extent, then, what the documents contain must be a matter of speculation. But they deal with precisely the subject matter of the action and what one party was doing in relation to the relevant transactions at the time.

The task will be even more difficult if, as can be expected in most criminal trials, the documents deal with some matter in issue or some matter relevant to a matter in issue, and not with the precise matter charged. Accordingly, no more should be required of an accused than that he or she show that the conduct of the defence will be impeded if the documents are not made available. And that will be done if he or she establishes some basis for an inference that the documents can be put to some forensic use in the defence case.

McHugh J:

The question in this appeal is whether a document recording a communication that is otherwise protected from production by legal professional privilege must be produced for the purpose of a criminal trial if the communication may establish the innocence of the accused or materially assist the furtherance of that person's defence. The appellant, who contends that this question should be answered in the affirmative, accepts that no decision of this Court or in this country establishes such a proposition. But, relying on decisions in other countries (*Reg. v. Barton* [1973] 1 WLR 115; *Reg. v. Craig* [1975] 1 NZLR 597; *Reg. v. Ataou* [1988] QB 798), he contends that this Court should now declare a new exception to the doctrine of legal professional privilege that would enable an accused person to obtain documents that were otherwise protected from disclosure by that doctrine. In my opinion, this contention should be rejected. A communication that is protected by legal professional privilege is not required to be disclosed to the Court or to the accused even if the communication will establish the innocence or materially assist the defence of an accused person unless it falls within one of the established "exceptions" to the privilege.

Communications between legal advisers and their clients concerning contemplated or pending litigation cannot be disclosed without the consent of the client (*Grant v. Downs* [1976] 135 CLR 674; *Attorney-General (NT) v. Kearney* [1985] 158 CLR 500; *Attorney-General (NT) v. Maurice* [1986] 161 CLR 475; *Waterford v. The Commonwealth* [1987] 163 CLR 54). Similarly, communications made to obtain or to give legal advice cannot be disclosed without the consent of the client (*Minet v. Morgan* [1873] 8 Ch App 361; *Bullivant v. Attorney-General for Victoria* [1901] AC 196). "Legal professional privilege" is the shorthand description of the right that protects these communications from being disclosed without the consent of the lay client. The right is a substantive rule of law and not a mere rule of evidence (*Baker v. Campbell* [1983] 153 CLR 52). Courts in this country have held that legal professional privilege is available as an answer to the production of documents even in criminal proceedings (*Reg. v. Cahill; Ex Parte McGregor* [1985] 61 ACTR 7; *Cain v. Glass (No. 2)* [1985] 3 NSWLR 230; *Adams v. Anthony Bryant & Co. Pty. Ltd.* [1986] 67 ALR 616; *Grofam Pty. Ltd. v. Australia and New Zealand Banking Group Ltd.* [1993] 117 ALR 669). In *Adams v. Anthony Bryant & Co. Pty. Ltd.* [1986] 67 ALR 616, for example, Wilcox J held that witness statements prepared by the Trade Practices Commission were the subject of legal professional privilege and that the defendants who were being prosecuted for breaches of the Trade Practices Act 1974 (Cth) were not entitled to production of the statements. The privilege is not available, however, in respect of communications that are made to facilitate the commission of a crime or fraud (*Reg. v. Cox and Railton* [1884] 14 QBD 153 at 165; *Bullivant* [1901] AC at 201; *Varawa v. Howard Smith & Co. Ltd.* [1910] 10 CLR 382 at 385, 386, 390) or the abuse of an exercise of public power (*Kearney* [1985] 158 CLR 500 or the frustration of the order of a Court (*Reg. v. Bell; Ex parte Lees* [1980] 146 CLR 141).

One rationale put forward for the protection of communications concerning pending or contemplated litigation is that the protection of such communications "assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline" (*Grant* [1976] 135 CLR at 685; *Kearney* [1985] 158 CLR at 511). This rationale assumes that, without the protection of legal professional privilege, a client and his or her witnesses would often be reluctant to make a frank disclosure to the legal adviser of all relevant circumstances, including those of a damaging, embarrassing or incriminating nature. The existence of the privilege is therefore said to promote trust and candour between the client and the legal adviser and to assist the legal adviser to advise with confidence whether legal action should be initiated, defended or compromised. In

Attorney-General (NT) v. Maurice [1986] 161 CLR 475 at 480, Gibbs CJ said that, without the doctrine, the administration of justice in accordance with the adversary system would be greatly impeded. In *Bullivant v. Attorney-General for Victoria* [1901] AC 196 at 200, the Earl of Halsbury LC said that legal professional privilege exists for the more "perfect administration of justice".

However, legal professional privilege also protects communications that seek or give legal advice in cases where no litigation is pending or contemplated (*Minet* [1873] 8 Ch App 361). The rationale that the doctrine is necessary for the "proper functioning of the legal system" (*Kearney* [1985] 158 CLR at 511) or the "perfect administration of justice" (*Bullivant* [1901] AC at 200) hardly seems applicable to non-litigious communications between legal adviser and client unless the concepts of "the legal system" and "the administration of justice" are given extended and artificial meanings.

Now that this Court has held that legal professional privilege is not a rule of evidence but a substantive rule of law, the best explanation of the doctrine is that it is "a practical guarantee of fundamental, constitutional or human rights" (*A.M. & S. Europe Ltd. v. Commission of The European Communities* [1983] QB 878 at 941 and see *Solosky v. The Queen* [1979] 105 DLR (3d) 745 at 760; *Reg. v. Uljee* [1982] 1 NZLR 561 at 569; *Descoteaux v. Mierzwinski* [1982] 1 SCR 860 at 880 citing *Reg. v. Littlechild* [1979] 108 DLR (3d) 340 at 347; *Geffen v. Goodman Estate* [1991] 81 DLR (4th) 211 at 232; *Maurice* [1986] 161 CLR at 490). By protecting the confidentiality of communications between lawyer and client, the doctrine protects the rights and privacy of persons including corporations by ensuring unreserved freedom of communication with professional lawyers who can advise them of their rights under the law and, where necessary, take action on their behalf to defend or enforce those rights. The doctrine is a natural, if not necessary, corollary of the rule of law and a potent force for ensuring that the equal protection of the law is a reality.

This Court has accepted that, although the doctrine is based on the requirements of the public interest, its application in particular cases does not depend upon balancing it against other rights that are grounded in the public interest, (*Waterford* [1987] 163 CLR 54). Not even the public interest in Courts having all relevant evidence before them has been considered sufficient to override the public interest in maintaining the unqualified operation of the privilege. As Deane J pointed out in *Attorney-General (NT) v. Maurice* [1986] 161 CLR at 490:

> Its efficacy as a bulwark against tyranny and oppression depends upon the confidence of the community that it will in fact be enforced. That being so, it is not to be sacrificed even to promote the search for justice or truth in the individual case or matter and extends to protect the citizen from compulsory disclosure of protected communications or materials to any Court or to any tribunal or person with authority to require the giving of information or the production of documents or other materials.

The argument that any document that might assist a person to defend a criminal charge should be available to that person might seem instinctively to be unanswerable. But to uphold it would be inconsistent with the rationale of the doctrine of legal professional privilege and that privilege has been recognised since the reign of Elizabeth I (*Berd v. Lovelace* [1577] Cary 62 (21 ER 33)). Its "scope and conditions" (Holdsworth, *A History of English Law*, 3rd Edn., (1944), Vol. 9 at 202) were settled by the middle of the last century. To uphold it would undermine the right of the individual to consult a lawyer on legal matters secure in the knowledge that, in the absence of a statutory command to the contrary, what passes between them is confidential and forever safeguarded from disclosure unless the communication is

made to facilitate the commission of a crime or a fraud or the abuse of an exercise of public power or the frustration of the order of a Court. If any exception to this fundamental right of the citizen is to be made, it should be done by the elected representatives of the people and not by the judiciary, see (*Grant* [1976] 135 CLR at 685).

In England, the doctrine of legal professional privilege was severely qualified in 1972 by the ruling of Caulfield J in *Reg. v. Barton* [1973] WLR 115 at 118 where his Lordship, in the course of presiding over a criminal jury trial on circuit, held that:

> If there are documents in the possession or control of a solicitor which, on production, help to further the defence of an accused man, then in my judgment no privilege attaches. I cannot conceive that our law would permit a solicitor or other person to screen from a jury information which, if disclosed to the jury, would perhaps enable a man either to establish his innocence or to resist an allegation made by the Crown.

Caulfield J recognised that this proposition was not supported by any authority that had been cited to him. His Lordship said that he was "just working on what I conceive to be the rules of natural justice" (*ibid*). Text book writers (*Halsbury's Laws of England*, 4th Edn., Vol. 11(2) at para. 1163; *Cross on Evidence*, 4th Aust. Edn., (1991), Vol. 1 at para. 25,300; Archbold, *Criminal Pleading Evidence & Practice*, (1993), Vol. 1 at 1573; McNicol, *Law of Privilege*, (1992) at 101-104) have given general support to the proposition. The appellant relied on it. But in my opinion, given the settled interpretation of the doctrine of legal professional privilege in Australia and its rationale, it cannot be accepted in this country.

First, it is inconsistent with the terms in which the doctrine of legal professional privilege has been formulated and applied in this Court. Apart from a statement in a dissenting judgment of Gibbs CJ (*Baker* [1983] 153 CLR at 68) which arguably accepted the proposition, those formulations contain no hint of any such exception to the doctrine of legal professional privilege. Implicitly, they have accepted that any reform of the doctrine, if it is in need of reform, is a matter for the legislature. Indeed, in *Grant v. Downs* [1976] 135 CLR 674 at 685, Stephen, Mason and Murphy JJ said that as "a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exercised by judicial decision".

Secondly, the making of an exception to the doctrine of legal professional privilege, such as that formulated in *Barton's* case, could be justified only if this Court ruled that the public interest in an accused person obtaining all relevant evidence outweighed the public interest justifying the doctrine of legal professional privilege. To so rule would be inconsistent with the *ratio decidendi* of *Waterford v. The Commonwealth* [1987] 163 CLR 54 at 64-65 which held that:

> Legal professional privilege is itself the product of a balancing exercise between competing public interests whereby, subject to the well-recognized crime or fraud exception ... the public interest in 'the perfect administration of justice' ... is accorded paramountcy over public interest that requires, in the interests of a fair trial, the admission in evidence of all relevant documentary evidence. Given its application, no further balancing exercise is required.

The *ratio decidendi* of *Waterford* could not logically stand with the *Barton* exception.

Thirdly, the established "exceptions" to legal professional privilege provide no ground for developing a further exception along the lines formulated in *Barton's* case. The so-called exceptions to the doctrine are in truth not exceptions at all. Rather they identify circumstances where the doctrine does not apply to communications between legal adviser and client. They exclude from the protection of the privilege communication that are designed to facilitate future wrongdoing. Thus, communications that come within the exceptions never attract the

grant of legal professional privilege. The rule formulated in *Barton*, however, qualifies the operation of the privilege. It seeks to divest of protection communications that have become the subject of privilege. No valid analogy can therefore be drawn between the established "exceptions" and the exception formulated by Caulfield J in *Barton*.

Fourthly, the exception formulated in that case is contrary to and undermines the rationale of legal professional privilege. If a person has a fundamental human right to obtain legal advice secure in the knowledge that what passes between the lawyer and that person is forever safeguarded from disclosure, the suggested exception impairs that right. In many cases, adoption of the exception would have serious consequences for a person seeking legal advice and assistance.

If the rule formulated in *Barton* is to be introduced into Australian law, it will have to be on pragmatic grounds, based on general notions of justice to the accused, that ignore the symmetry of legal doctrine. From time to time in any common law system of justice, cases arise where an entrenched legal rule operates so unjustly in a particular situation that it is the duty of an ultimate appellate Court to modify the rule's operation in that situation, notwithstanding that the modification is based on nothing more than the consequences of the rule. But even when the outcome of applying a legal rule to a particular situation seems plainly unjust, before a Court modifies the rule it needs to be sure that the modification does not produce undesirable consequences in that or other situations or undermine the operation of other legal rules. Small modifications of legal rules sometimes have large effects that are not foreseen at the time.

One difficulty with the suggested exception is that it is impossible to know to what extent it would prevent people from obtaining legal advice or would inhibit frankness and candour in communications between legal adviser and client. In situations giving rise to legal controversy, matters that support and matters that undermine a person's case are frequently found together. Under the present doctrine, clients can put all the circumstances of which they are aware before their legal advisers secure in the knowledge that what passes between them is privileged. Whether they would continue to be so frank if they knew that those communications could be made public if they might assist an accused person cannot be known with certainty. In the majority of cases, one would think that it would make little difference. But in cases where revelation of the contents of a communication demonstrated actual or arguable wrongdoing on the part of a potential client, it does not seem fanciful to suppose that the person would be extremely reluctant to seek legal advice or to put all the circumstances before the legal adviser. One does not have to accept the argument of Counsel for the fourth and fifth respondents that the exception contended for by the appellant is a "virtual abolition of legal professional privilege" to accept that adoption of the exception could have serious consequences for the general administration of justice.

Some consequences of and difficulties with the suggested exception are apparent. If the exception applied to a communication between a co-accused and his or her legal adviser, revelation of the communication might lead to the conviction of that person without securing the acquittal of the accused person who had obtained access to the communication. What may further the defence of the accused will not necessarily establish that person's innocence. Nor will it necessarily establish the guilt of a co-accused. But it may seriously prejudice that person's defence by revealing matters that undermine his or her case or support the prosecution's evidence. The case where a communication between a lawyer and a co-accused points unmistakably to the latter's guilt and exculpates the accused is likely to be truly exceptional. It is much more likely that, where the contents of a legally privileged

communication between a co-accused and a legal adviser assist the accused, it will do so by implicating the co-accused or undermining that person's defence rather than positively proving the innocence of the accused. The result may be that the co-accused is convicted without the accused being acquitted. Whether or not the conviction of the co-accused is wrong, that person may not have been convicted if the *Barton* exception had not required disclosure of the privileged communication. Plainly, that exception has serious consequences for a co-accused.

Similarly, the exception has serious consequences for any person who is or could be charged with an offence if disclosure of the contents of an otherwise privileged communication might incriminate or tend to undermine the defence of that person. Even when a person has been charged with but acquitted of an offence, disclosure of a communication may result in a charge of perjury against that person. The civil or social consequences of disclosure may also have repercussions for a person that he or she would regard as worse than the imposition of a penalty for a minor criminal offence. Quite apart from any exposure to a civil action for damages, disclosure of a legally privileged communication may reveal shameful conduct that would seriously damage the reputation or standing in the community of the person entitled to the benefit of the privilege. To uphold the *Barton* exception would seem sure to cause serious damage to persons entitled to the benefit of the privilege. While legal professional privilege continues to exist, it seems difficult to justify that exception when it would produce such consequences. This is particularly so when the exception applies to documents that merely help to further the accused's defence.

In *Reg. v. Ataou* [1988] QB 798, the English Court of Appeal reformulated the *Barton* exception to overcome the difficulties that arise if the *Barton* exception applies to any communication that furthers the defence of an accused person. After referring to that case and *Reg. v. Craig* [1975] 1 NZLR 597, the Court of Appeal said (*Ataou* [1988] QB at 807. See also the judgment of Cooke J in *Craig* [1975] 1 NZLR at 599, which is the source of much of the rule formulated in *Ataou*, where his Honour said: "When a communication was originally privileged and in criminal proceedings the privilege is claimed against the prosecution, in respect of evidence by the client originally concerned or his solicitor, the onus should be on the prosecution to show that the claim cannot be sustained. That might be done either by demonstrating that there is no ground on which the client could any longer be reasonably regarded as having a recognisable interest in asserting the privilege or that an established exception applies"):

> When a communication was originally privileged and in criminal proceedings privilege is claimed against the defendant by the client concerned or his solicitor, it should be for the defendant to show on the balance of probabilities that the claim cannot be sustained. That might be done by demonstrating that there is no ground on which the client could any longer reasonably be regarded as having a recognisable interest in asserting the privilege. The Judge must then balance whether the legitimate interest of the defendant in seeking to breach the privilege outweighs that of the client in seeking to maintain it.

Adoption of this exception to the doctrine of legal professional privilege would not assist the appellant in this case. The respondents have recognisable interests in maintaining the privilege that each claims. But in any event it is not possible, having regard to the decisions of this Court, to uphold the exception formulated in *Ataou*. Quite apart from the difficulty in identifying whether a person still has a recognisable interest in asserting the privilege, this Court has rejected the notion that the public interest in legal professional privilege can be balanced against other interests.

Moreover, with great respect to those who think otherwise, I think that there are practical difficulties in the suggestion that the rights of persons otherwise entitled to the privilege can be protected by orders controlling access to the documents. It is the communication and not the document that needs and is given protection. In many cases, once the contents of a communication become public, the damage to the person otherwise entitled to the privilege will be done. Moreover, a Court may restrain the use of the documents but it is not always as easy to restrain the use of information derived directly from those documents or from the consequential tender of evidence based on that information. A document may assist the defence of the accused without being admissible in evidence. No doubt many documents recording communications between legal advisers and clients that would not be admissible at common law would now be admissible under the business records and documentary evidence legislation of many jurisdictions. But, if the exception were available, it would often be necessary to call the legal adviser or some other person to give evidence concerning a fact or matter referred to in the communication. In other cases, the value of the privileged communication to the accused would lie in the avenues of inquiry that it opened up or in the information that it provided to cross-examine witnesses. Making orders that would prevent persons other than the accused from profiting from the disclosed information would be no easy task.

Furthermore, if an exception to the doctrine of legal professional privilege were made in favour of the accused in criminal trials, it would seem difficult to resist making some exception in favour of the Crown. If the accused is entitled to privileged documents that might further his or her defence, why should the Crown be denied access to privileged documents that might establish the accused's guilt or undermine that person's defence where those documents contain the accused's own communications with his or her legal adviser? The Crown as well as the accused has the right to a fair trial. It hardly seems consistent with the idea of a fair trial that the accused should have access to legally privileged documents for the purpose of attacking the evidence of the prosecution witnesses when the Crown is denied access to the same class of documents for the purpose of attacking the evidence of the accused or the person's witnesses.

In my opinion, to uphold the appellant's claim would interfere with the operation of the doctrine of legal professional privilege in ways that are altogether hostile to its rationale. Established principle unquestionably requires rejection of the appellant's contention that the Court should hold that documents that may assist the furtherance of an accused person's defence must be produced to the Court notwithstanding that they are the subject of legal professional privilege. And an examination of the likely consequences of the suggested exception does not persuade me that making it can be justified on the pragmatic ground that the interests of justice demand it. No doubt in some cases access to such documents may considerably improve a person's chance of acquittal. In other cases, however, the exception may seriously damage interests which the doctrine of legal professional privilege is designed to protect without securing the acquittal of the accused. If any exception is to be made to the fundamental right of the citizen that is protected by the doctrine - and I do not suggest that it should - it should be done by the legislature after a full investigation and consideration of the matter.

Order

In my opinion, the appeal should be dismissed.